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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

S. JEFFREY BESSER,

Petitioner,

vs.

CHARLOTTE GREENFIELD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

ON APPEAL FROM
THE NEW MEXICO SUPREME COURT

BRIEF IN OPPOSITION

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pro se

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TABLE OF CONTENTS

Table of Authorities i

Text of New Mexico Rules of Appellate Procedure iv

Statement of Case 1

Summary of Argument 2

Argument

A. Petitioner's Notice of Appeal Was Not Timely Filed 3

B. Petitioner's Counsel Did Not Pursue Available Alternatives 11

C. Questions Asserted by Petitioner Were Not Raised in the State Courts 13

D. State Court's Denial of Certiorari Rests Upon State Procedural Grounds 16

Conclusion 19

TABLE OF AUTHORITIES

	Page
A. Cases	
Atlantic Coast Line R. Co. v. Mims, 242 U.S. 532, 61 L.ed 476, 37 S.Ct. 188 (1917)	14
Bouldin v. Bernard, Inc., 78 N.M. 188, 429 P.2d 647 (1967)	10
Brazfield v. Mountain States Mut. Cas. Co., 93 N.M. 47, 600 P.2d 1207 (1979), cert. d. 93 N.M. 205, 598 P.2d 1165	9
Broad River Power Co. v. South Carolina, 281 U.S. 537, 74 L.ed 1023, 50 S.Ct. 401 (1930)	19
Cardinale v. Louisiana, 394 U.S. 437, 22 L.ed 2d 398, 89 S.Ct. 1162 (1969)	14,15
Fuller v. Oregon, 412 U.S. 40, 40 L.ed 2d 642, 94 S.Ct. 2116 (1974)	15
Gonzales v. City of Albuquerque, 90 N.M. 785, 568 P.2d 621 (1977)	9,10
Guess v. Gulf Ins. Co., 94 N.M. 139, 607 P.2d 1157 (1980)	9
John v. Paullin, 231 U.S. 583, 58 L.ed 381, 34 S.Ct. 178 (1913)	18,19
Johnson v. Johnson, 74 N.M. 567, 396 P.2d 181 (1964)	10

Marquez v. Wylie, 78 N.M. 548, 434 P.2d 69 (1967) 6

McDonald v. Oregon R. & Nav. Co., 233 U.S. 665, 58 L.ed 2d 1145, 34 S.Ct. 772 (1914) 19

N.A.A.C.P. v. Alabama, 377 U.S. 288, 12 L.ed 2d 325, 84 S.Ct. 1302 (1964) 17,18,19

New Mexico Savings & Loan Ass'n v. Blueher Lumber Co., 80 N.M. 254, 454 P.2d 268 (1969) 9

Nickel v. Cole, 256 U.S. 222, 65 L.ed 900, 41 S.Ct. 467 (1921) 19

Oxley Stave Co. v. Butler County, 166 U.S. 648, 41 L.ed 1149, 17 S.Ct. 709 (1897) 14

Parker v. Illinois, 333 U.S. 571, 92 L.ed 886, 68 S.Ct. 708 (1948) 19

Rice v. Gonzales, 79 N.M. 377, 444 P.2d 288 (1968) 9

State v. Weddle, 77 N.M. 417, 423 P.2d 609 (1967) 9

Staub v. City of Baxley, 355 U.S. 313, 2 L.ed 2d 302, 78 S. Ct. 277 (1958) 18

Webb v. Webb, 451 U.S. 493, 68 L.ed 2d 392, 101 S.Ct. 1889 (1981) 14

White v. Singleton, 88 N.M. 262, 539 P.2d 1024 (1975) 12

B. Constitutional Provisions

Article IV, Section 34, New Mexico State Constitution 6

Article II, Section 18, New Mexico State Constitution 13

First Amendment, United States Constitution 18

Fourteenth Amendment, United States Constitution 13

C. Statutes

28 U.S.C. §1257 (C) 13

D. Treatices

Moore's, Federal Practice, §204.13(2) 8

12 New Mexico Law Review 148 12

TEXT OF NEW MEXICO RULES OF APPELLATE PROCEDURE

Rule 3(a), Rules of Appellate Procedure for Civil Cases

In civil actions, any party aggrieved may appeal to the appropriate appellate court within thirty days after entry of:

(1) any final judgment or decision;

(2) any interlocutory order or decision which practically disposes of the merits; (findings of fact, conclusions of law and written opinions are not deemed interlocutory orders or decisions which practically dispose of the merits.)

(3) any final order after entry of judgment which affects substantial rights; or

(4) judgment in any proceeding for civil contempt. Additional time for taking a cross-appeal may be available under Rule 4(c).

Rule 3(f), Rules of Appellate Procedure for Civil Cases

Upon a showing of excusable neglect or circumstances beyond the control of the appellant, the district court may extend the time for filing the notice of appeal or application for an order allowing an appeal by any party for a period not to exceed thirty days from the expiration of the time otherwise prescribed by this rule. Such an extension may be granted before or after the time otherwise prescribed by this rule has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate. [As amended, effective September 1, 1975].

Rule 3(f), Rules of Appellate Procedure for Civil Cases, as amended January 1, 1983:

Upon a showing of excusable neglect or circumstances beyond the control of the appellant, the district court may extend the time for filing the notice of appeal or application for an order allowing an appeal by any party for a period not to exceed thirty days from the expiration of the time otherwise prescribed by this rule. Such an extension may be granted before or after the time otherwise prescribed by this rule has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate. No motion for extension of time to file the notice of appeal may be granted after 60 days from the time the appealable order is entered. If the motion is not granted within the 60 days,

the motion is automatically denied. [As amended, effective September 1, 1975 and January 1, 1983.]

Rule 19(a), Rules of Appellate Procedure for Civil Cases

A motion for rehearing may be filed within fourteen days after entry of the appellate court's decision, or any subsequent modification of its decision or opinion, unless the time is shortened or enlarged by order. The motion shall state briefly and with particularity but without argument the points of law or fact which in the opinion of the movant the court has overlooked or misapprehended. If the motion is based upon a point of law or fact not raised, briefed or argued by any party but relied upon by the court in its disposition of the matter, the motion shall specifically so state,[and] shall be accompanied by a brief in support thereof. If the court grants the motion for rehearing, opposing parties shall be allowed ten days within which to respond. In all other cases the movant

may, but is not required to, file a brief in support of the motion at the time it is filed but no response will be received unless requested by the court. Oral argument on the motion will not be permitted unless ordered by the court. If a motion for rehearing is granted the clerk shall give notice thereof and any party may, or, if the court directs, shall, within ten days after notice, file a brief addressed solely to the issue specified in the order granting rehearing. There shall be no other briefs or argument unless the court shall otherwise direct.

STATEMENT OF CASE

Greenfield v. Besser, a divorce case, was filed in the District Court, in Dona Ana County, New Mexico on September 29, 1982. A Final Decree of Dissolution of Marriage was filed September 15, 1983. (R 89-95). Petitioner filed, on October 3, 1983, a Motion for Extension of Time Within Which to File Notice of Appeal. (R 96-7) A hearing was held on Petitioner's Motion on November 14, 1983. (R 100) On November 18, 1983, the sixty-fourth day after entry of the decree, both an Order Extending Time and Petitioner's Notice of Appeal were filed. (R 111,112)

Petitioner appealed to the state appellate courts, which held that they lacked jurisdiction, because Petitioner's Notice of Appeal was not timely under New Mexico appellate procedural rules.

SUMMARY OF ARGUMENT

The decision of the New Mexico Supreme Court to dismiss Petitioner's appeal was based on its finding that Petitioner's Notice of Appeal was not timely, under New Mexico appellate rules. That decision was legally correct, according to long-standing New Mexico requirements, even under the appellate rule which Petitioner urges be applied.

Petitioner's counsel, when faced with the onset of the appeal deadline, did not pursue alternative remedies, and Petitioner cannot now argue that the deadline of the appellate rule imposed impossible obstacles.

Petitioner failed to raise both New Mexico and Federal questions at the state court level, and the Supreme Court should decline to review issues not argued or decided by the state courts. The New Mexico Supreme Court's decision was based,

in its entirety, upon non-federal jurisdictional grounds, applied in the usual manner in the instant case. It is the province of the state to establish its own appellate procedures, and certiorari should be denied.

ARGUMENT

A. Petitioner's Notice of Appeal Was Not Timely Filed

In Greenfield v. Besser, the Final Decree of Dissolution of Marriage was entered by the District Court of Dona Ana County, New Mexico on September 15, 1983. (R 89-95). Petitioner's counsel filed a Motion for Extension of Time Within Which to File Notice of Appeal on October 3, 1983. (R 96-7). Despite attempts by Petitioner's counsel, no hearing was held on the motion until November 14, 1983, 60 days after entry of the Final Decree. (R 100). The district judge orally informed the parties on November 14th that he would

grant Petitioner an extension until November 18th to file his Notice of Appeal. The Order reflecting this decision was dated November 15th, but was not filed until November 18th.(R 111) Notice of Appeal was filed November 18, 1983, the 64th day after the date of the Final Decree.

The Supreme Court of New Mexico adopted, on November 17, 1983, several amendments to the Rules for Appellate Procedure affecting civil cases, and domestic relations cases in particular. Among the rule changes was the application of a new rule in domestic relations matters, Rule 202(e), which shortened the period within which a notice of appeal had to be filed to 10 days after the date of the final judgment, order or decree appealed from. The previous rule had allowed 30 days. A new rule, 202(c), permitted the filing of a motion for

extension of time within which to file a notice of appeal, but provided specifically that

> Upon good cause shown the district court may, before or after the time has expired, whether or not a notice of appeal has been filed, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by these rules. No motion for extension of time to file the notice of appeal may be granted after 40 days from the time the appealable order is entered. ... If the motion is not granted within the 40 days, the motion is automatically denied. Rule 202(c)

On appeal, the New Mexico Court of Appeals, the intermediate appellate court, dismissed the appeal, stating in its Memorandum Opinion that under Rule 202(a) and (c) Petitioner's Notice of Appeal was not timely filed. Petitioner then applied to the Supreme Court of New Mexico, which initially granted certiorari.

The Supreme Court agreed that the

appellate courts lacked jurisdiction and dismissed Petitioner's appeal but cited other grounds for its decision. The State Supreme Court ruled, in the instant case and in two others with which it was consolidated, that the new appellate rules, enacted in November 1982, could not be applied in cases filed prior to November 1982, because of Article IV, Section 34 of the state constitution which states:

> No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.

This constitutional provision applies to rules adopted by the State's highest court. Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967). The court therefore held that the Rules of Appellate Procedure for Civil Cases, applicable before November 1982, would govern the timeliness of appeals, and on that basis permitted

appeals in the two companion cases. Greenfield v. Besser, originally filed in September 1982, the Court held, was governed by the former rules as well, but because Petitioner's Notice of Appeal had been filed "after the 60-day period had elapsed" it was not timely filed under those rules, and the appeal was not permitted. It is that determination that Petitioner now appeals. (Petitioner's Petition for Writ of Cert., Appendix A, pp 30-35)

The New Mexico Supreme Court in its written decision quotes part of the former rule, Rule 3(f) of the Rules of Appellate Procedure for Civil Cases, but mistakenly quotes the rule as it was amended in January 1983, stating "no motion for extension of time to file the notice of appeal may be granted after 60 days from the time the appealable order is entered." (Decision p.5) Petitioner is correct that

the amendment to the rule should not, constitutionally, have been applied. However, the 1983 amendment made no substantive change in Rule 3(f) which would change the outcome in the instant case. Rule 3(f) prior to its 1983 amendment read:

> Upon a showing of excusable neglect or circumstances beyond the control of the appellant, the district court may extend the time for filing the notice of appeal or application for an order allowing an appeal by any party for a period not to exceed thirty days from the expiration of the time otherwise prescribed by this rule. Such an extension may be granted before or after the time otherwise prescribed by this rule has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate. (Emphasis added)

To quote Moore's Federal Practice, §204.13 (2), when characterizing similar language in the 1968 version of Rule 4(a) of the Federal Rules of Appellate Procedure,

> a straightforward reading of this language would require that a request for extension of time, and its grant, would have to take place within 30 days after expiration of the normal period.

Since Rule 3(a), applicable for several years before 1983, set a 30-day regular period for filing notices of appeal, if an extension were obtained under Rule 3(f), the maximum period would be 60 days after the date of the judgment. That immovable limit has been uniformly upheld by the New Mexico Court of Appeals and Supreme Court. Brazfield v. Mountain States Mut. Cas. Co., 93 N.M. 417, 600 P.2d 1207 (1979), cert. d., 93 N.M. 205, 598 P.2d 1165; New Mexico Savings & Loan Ass'n v. Blueher Lumber Co., 80 N.M. 254, 454 P.2d 268 (1969); Guess v. Gulf Ins. Co., 94 N.M. 139, 607 P.2d 1157 (1980).

Filing of a timely notice of appeal is jurisdictional. State v. Weddle, 77 N.M. 417, 423 P.2d 609 (1967), Rice v. Gonzales, 79 N.M. 377, 444 P.2d 288 (1968); Gonzales v. City of Albuquerque, 90 N.M. 785, 568 P.2d 621 (1977). In

so far as jurisdiction is concerned, it is not a discretionary matter. Johnson v. Johnson, 74 N.M. 567, 396 P.2d 181 (1964). Even though the district court might find, as happened here, good cause or excusable neglect to justify the granting of an extension, if no notice of appeal is filed until after the expiration of the 60-day maximum period, the order and notice have no effect. Gonzales v. City of Albuquerque, supra. It is not the holding of a hearing or orally announcing a decision within 60 days, as Petitioner contends, which satisfies the jurisdictional requirement. (Petition for Writ of Cert. pp 3,10,16-7) The act which the rule requires to be timely is the filing of the notice of appeal. Bouldin v. Bernard, Inc., 78 N.M. 188, 429 P.2d 647 (1967)

Petitioner's Notice of Appeal, not being filed until the 64th day after entry of the Final Decree, was not timely,

and the Supreme Court of New Mexico, under the pre-1982 rule Petitioner urges be applied, was correct in dismissing the appeal.

B. Petitioner's Counsel Did Not Pursue Available Alternatives

Petitioner argues that he was foreclosed arbitrarily and unfairly by a state procedural rule imposing a 60-day limit due to the fact the district judge could not hold a hearing within the time limit. However, several alternatives were available, which counsel for Petitioner failed to pursue. First, since the Motion for Extension was filed within the initial 30-day period, both pre and post 1983 versions of the appellate rule permit an order extending time to be entered ex parte, without a hearing. "[I]n so far as a motion for extension may be filed before the time for filing the notice has expired, the rule actually contemplates

ex parte proceedings so long as service of notice of those proceedings is otherwise made." White v. Singleton, 88 N.M. 262, 539 P.2d 1024 (1975) Secondly, the signing of the order granting extension by an alternative judge within the district might have been requested. Thirdly, as suggested by a writer in the New Mexico Law Review in 1982,

> Rule 3(f) limits the power of the district court to grant an extension to an additional 30 days from the date by which the notice of appeal must be filed. If the district court did not rule on the motion until more than sixty days after the judgment was rendered, it would lack authority to permit a subsequent filing of a notice of appeal. To overcome this problem, counsel should follow the practice adopted here: file the motion for extension together with a "protective" notice of appeal within 60 days after entry of a judgment. If the court grants the motion, the pre-filed notice of appeal becomes valid and is deemed to have been timely filed. 12 N.M.L. Rev. 148, f. 309.

Counsel for Petitioner attempted none of these measures.

C. Questions Asserted by Petitioner Were Not Raised in the State Courts

The jurisdiction of the Supreme Court is asserted by Petitioner under 28 U.S.C. §1257(c) which permits the Supreme Court to review decisions of the highest state courts where the validity of a state statute (here, procedural rule) is drawn into question "on the ground of its being repugnant to the Constitution...of the United States." The New Mexico rule of appellate procedure, Petitioner alleges, violates Section 1 of the Fourteenth Amendment to the United States Constitution, the due process clause. Article II, Section 18 of the New Mexico Constitution also prohibits the taking of life, liberty or property "without due process of law." Petitioner's Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico, written by Petitioner's counsel, makes only the most general reference to

"his right of appeal" and "due process of law," without referral to either the U.S. or New Mexico Constitutions, or any case or statutory citations. (Appendix H, to Petition for Writ of Cert., p.61) Neither the Memorandum Decision by the New Mexico Court of Appeals or the Decision written by the state Supreme Court addresses the constitutional issue. Petitioner has failed to "specially" and "unmistakably" declare that he asserted United States Constitutional protections, and this Court should not hear or decide federal Constitutional issues raised for the first time. Oxley Stave Co. v. Butler County, 166 U.S. 648, 41 L.ed 1149 17 S.Ct. 709 (1897), Atlantic Coast Line R. Co. v. Mims, 242 U.S. 532, 61 L.ed 476, 37 S.Ct. 188 (1917); Cardinale v. Louisiana, 394 U.S. 437, 22 L.ed 2d 398, 89 S.Ct. 1162 (1969), Webb v. Webb, 451 U.S. 493,

68 L.ed 2d 392, 101 S.Ct. 1889 (1981) "The Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." As Justice White explained, it is important

> that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Cardinale v. Louisiana, supra.

Fuller v. Oregon, 417 U.S. 40, 40 L.ed 2d 642, 94 S.Ct. 2116 (1974)

Additionally, Petitioner failed to timely assert, to the Supreme Court of the State of New Mexico, the error he now asserts to this Court, since no timely Motion for Rehearing was filed. Rule 19 of the New Mexico Rules of Appellate Procedure in Civil Cases provides that a motion for rehearing at the appellate court level must be filed

within 14 days after the decision, "unless the time is ...enlarged by order.. .." Petitioner's Motion to Enlarge Time was not filed with the Clerk of the Supreme Court of New Mexico until June 25, 1984, over 90 days after the Supreme Court decision. Petitioner's Motion to Enlarge Time has not, as of this date, been acted upon. If the "error" committed would result in a change in outcome, the New Mexico Supreme Court should first have been given an opportunity to correct its mistake.

D. State Court's Denial of Certiorari Rests Upon State Procedural Grounds

The decision of the New Mexico Supreme Court dismissing Petitioner's appeal was based on non-federal grounds, namely Petitioner's lack of compliance with a jurisdictional requirement of the rules of appellate procedure. As shown in section A of this Argument, the applicable procedural

rule is uniformly held to impose an absolute requirement that a notice of appeal be timely filed. Timeliness is a jurisdictional condition to bringing an appeal. Petitioner makes no case that the state rule was applied to him either uniquely or discriminatorily. Nor does he assert that the state court employed the procedural requirement in order to stifle a federal claim. Yet Petitioner cites N.A.A.C.P. v. Alabama, 377 U.S. 288, 12 L.ed 2d 325, 84 S.Ct. 1302 (1964), as precedent for his argument that the United States Supreme Court may review the application and interpretation of state procedural rules by state courts. Petitioner ignores the profound factual differences involved in the two situations. Not only was the NAACP faced with the "permanent denial of the right to associate for the advocacy of ideas by lawful means," but it was apparent to

the Court that the state of Alabama had perverted the state law, by imposing a penalty upon the NAACP without statutory basis or judicial precedent, and by asserting a novel and unprecedented application of a procedural rule with "pointless severity" having as its very purpose the thwarting of Supreme Court review of "unquestioned Constitutional rights" under the First and Fourteenth Amendments. NAACP v. Alabama, supra, at 332,335,338-9.

The New Mexico Supreme Court, in the instant case, applied a generally recognized non-federal jurisdictional rule setting a time limit for bringing appeals. It, as Justice Frankfurter stated,

> rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise. Staub v. City of Baxley, 335 U.S. 313,2 L.ed 2d 302, 78 S.Ct. 277 (1958) (dissenting opinion); John v. Paullin,

231 U.S. 583, 58 L.ed 381, 34 S.Ct. 178 (1913); McDonald v. Oregon R. & Nav. Co., 233 U.S. 665, 58 L.ed 2d 1145, 34 S.Ct. 772 (1914)

Unless the state court has perverted the state procedural rule, as the Supreme Court found in N.A.A.C.P. v. Alabama, or unless the litigant is denied a reasonable channel of appeal, no federal question is presented, and the decision by the state court will not be reviewed. Broad River Power Co. v. South Carolina, 281 U.S. 537, 74 L.ed 1023, 50 S.Ct. 401 (1930); Nickel v. Cole, 256 U.S. 222, 65 L.ed 900, 41 S.Ct. 467 (1921); Parker v. Illinois, 333 U.S. 571, 92 L.ed 886, 68 S.Ct. 708 (1948).

CONCLUSION

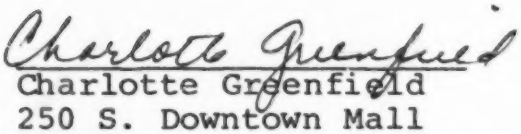
No properly raised federal question is presented by the Petition for Writ of Certiorari in this matter. The only federal question, denial of due process, was not specially raised or argued by Petitioner at the state court level, and

the opinion of the New Mexico Supreme Court does not even touch upon the federal or constitutional issue. Even if properly preserved for review by the Supreme Court, Petitioner failed to follow a long-standing jurisdictional requirement, that a timely notice of appeal be filed, and the Supreme Court of New Mexico correctly decided the case on non-federal procedural grounds.

It is apparent, therefor, that the federal question which the Petitioner seeks to bring to the consideration of the United States Supreme Court is wholly without merit and is one which has already been foreclosed by prior decisions of the Court. Appellee requests that certiorari be denied, or, in the alternative, that the

decision of the New Mexico Supreme Court be affirmed.

Respectfully submitted,



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